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No. 04-413

Supreme Court, U.S.
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# In The Supreme Court of the United States

THE CITY OF ALBUQUERQUE,
a municipal corporation, *et al.*,

*Petitioners,*

v.

RICK HOMANS and SANDER RUE,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit**

## REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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## I. THERE IS A CLEAR CONFLICT BETWEEN THE SECOND AND TENTH CIRCUITS.

The Tenth Circuit majority opinion[1] imposes a *per se* ban on candidate spending limits and therefore conflicts with the Second Circuit holding in *Landell v. Sorrell*, 382 F.3d 91 (2d Cir. 2004), which allows a court to consider new facts and legal interests not considered by the *Buckley* court. Although the majority opinion gives a perfunctory nod to the notion that "strict scrutiny does not require automatic invalidation of governmental regulations," App. 29, it is quite emphatic that there is *no evidence* that possibly could be presented to uphold the spending limits. *See* App. 28 ("[U]nder *Buckley* such restrictions cannot be supported as a matter of law. . . . Since all three of the asserted interests are thus constitutionally incapable of justifying spending restrictions as a matter of law, the court need not entertain the evidence submitted by the City."); App. 31-32 ("One can safely conclude that *Buckley* forecloses a finding that spending limitations can be narrowly tailored to further governmental justifications other than the anti-corruption interest sustained by the Supreme Court, no matter what evidence may be presented."); App. 34 ("[C]andidate spending limitations cannot be justified by the anti-corruption rationale. . . . I doubt that any evidence would sustain such limitations under *Buckley*."). This is no different than a *per se* ban.

Moreover, there is a clear conflict between the two Circuits as to whether the state interests *both* in deterring the reality and appearance of corruption *and* in preserving the time of officeholders and candidates are sufficiently compelling to support candidate spending limits. *See* Cert.

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[1] As in the Petition for Writ of Certiorari, the phrase "majority opinion" refers to the opinion of Judge Tymkovich. *See* Cert. Pet. at 7.

Pet. at 19-22; *compare* App. 28, 31-32, 34 *with Landell*, 382 F.3d at 124 ("[W]e conclude that Vermont has established at least two interests in maintaining campaign expenditure limits: preventing the reality and appearance of corruption, and protecting the time of candidates and elected officials.").

Counsel for respondent Rue have acknowledged, in their Petition for Rehearing *En Banc* on behalf of plaintiffs in *Landell*, that the opinion below imposes a *per se* ban and "specifically reject[s both] the time and corruption interests." Petition for Rehearing *En Banc*, *Landell v. Sorrell*, No. 00-9159 (L) (2d Cir. docketed Sept. 1, 2004), at 1 (hereafter "*Landell* Reh'g Pet.") (stating the decision "hold[s] spending limits to be unconstitutional as a matter of law and specifically reject[s] the time and corruption interests embraced here."). In that Petition, counsel also stated, "The notion that the constitutionality of spending limits remains an open question to be determined by the facts of each case was directly rejected [by the Tenth Circuit]." *Id.* at 5.

## II. JUDGE LUCERO'S OPINION DOES NOT ELIMINATE THE CONFLICT BETWEEN THE TENTH AND SECOND CIRCUITS.

The Rue opposition posits Judge Lucero's opinion, which it characterizes as consistent with *Landell*, as an alternative holding on which the Tenth Circuit majority relied. As already noted, however, although nominally concurring with Judge Lucero's factual discussion, *see* App. 27-28, 34, the majority opinion is emphatic that the factual record before the Court was unimportant. Therefore, Judge Lucero's opinion simply does not rise to the level of an alternative holding. Rue's counsel's statement to the *Landell* court – "that the constitutionality of spending limits

remains an open question to be determined by the facts of each case was directly rejected" – is an accurate assessment of the Tenth Circuit decision. *Landell* Reh'g Pet. at 5.

Even so, an examination of Judge Lucero's opinion reveals errors of law that entirely preclude it from serving as a viable alternative holding. For example, Judge Lucero faults the City because there is no evidence of corruption in Albuquerque rising to the level of the evidence before the Court in *Buckley*, which "smelled of actual quid pro quo." App. 20. Although Petitioners have addressed this argument, *see* Cert. Pet. at 17-21 & n.13, it is worth pointing out that one would not expect to find extensive evidence of corruption in Albuquerque – nor can the lack of such evidence logically mean that spending limits are unnecessary – because Albuquerque has had both contribution limits and spending limits since 1974.[2] *See, e.g., Colorado Republican Federal Campaign Committee v. FEC*, 533 U.S. 431, 457 (2001) (noting difficulty of proving harms that would exist in absence of long-enforced statute). Indeed, the fact that Albuquerque has been free of the kind of corruption seen elsewhere and that its citizens do express confidence in government clearly *supports*, rather than *undermines*, the case for upholding the City's spending limits.

Judge Lucero also inappropriately discounted the City's evidence regarding the federal experience with limited contributions and unlimited spending. Local governments are entitled to rely on the experiences of other jurisdictions – including the federal government – in assessing the need for particular campaign finance regulations. *Nixon v.*

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[2] In the 1974 vote to amend the City Charter, the election code (including spending limits) constituted its own proposition on the ballot. Rue App. 561-562, 568, 571.

*Shrink Missouri Gov't PAC*, 528 U.S. 377, 394 n. 6 (2000); *Missouri Repub. Party v. Lamb*, 270 F.3d 567, 570 (8th Cir. 2001) (state entitled to rely on evidence of circumvention in federal elections to justify state limits on political party contributions).

Finally, Judge Lucero's discussion of the facts ignores the standards governing summary judgment. "[I]n ruling on a motion for summary judgment, the nonmoving party's evidence 'is to be believed, and all justifiable inferences are to be drawn in that party's favor.'" *Hunt v. Cromartie*, 526 U.S. 541, 552 (1999) (*quoting Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)) (reversing grant of summary judgment to plaintiffs who challenged redistricting plan as racially motivated). Judge Lucero did not do so.

To provide but two of many examples of error in Judge Lucero's opinion, each of which improperly negates a part of the City's evidence regarding the vibrancy of Albuquerque's elections: The opinion impermissibly weighs the turnout and electoral competition evidence submitted by the parties and then resolves the factual disputes against the City. App. 17-18, 26. Thus, Judge Lucero concludes that (1) turnout in Albuquerque is no better than in comparable cities, and (2) spending limits have not enhanced electoral competition. Because the City's evidence is decidedly to the contrary, Judge Lucero's findings constitute error.[3]

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[3] For example, Homans presented no evidence disputing the conclusions of the City's expert concerning turnout, and the City's expert showed that, once an obvious error offered by Rue's expert was corrected, Albuquerque's turnout rate of 28.3% (as a percentage of eligible voters) was higher than any of the comparable cities listed in the reference work for the relevant period (1974-1989). Rue App. 469, 861. In addition, it is undisputed that mayoral incumbents in Albuquerque have been far more vulnerable to challenge than in cities

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These erroneous applications of governing law negate the validity of Judge Lucero's opinion as an alternative holding.[4]

## III. *BUCKLEY* DOES NOT PRECLUDE THE TIME-PROTECTION INTEREST.

Both Rue and Homans argue that the *Buckley* Court considered and rejected the interest in preserving the time of officeholders and candidates. As the Petition demonstrates, their argument is in error. Cert. Pet. at 23-25.

In any event, no one could pretend there was the kind of time pressure on candidates in 1976 that there is today, when costs have risen to approximately $900,000 and $5 million for average winning congressional and Senate elections, respectively. *See* http://www.opensecrets.org/bigpicture/stats.asp?cycle=2002 (regarding 2002 election cycle) (visited November 2, 2004).[5] Adjusted for inflation, the cost of a winning campaign for both the House and Senate rose by over 150% between 1986 and 2000. *See Amici* Brief of Former Senators Bill Bradley and Alan Simpson ("Bradley/Simpson Br."), at 4. To make that concrete, "In 1992, the average Senator had to raise nearly $13,000 *each week* for the entire six-year term in order to

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without spending limits, and a high percentage of city council elections have been contested and have had close margins of victory. *See* Rue App. 440-441, 819-823, 854-858.

[4] If Judge Lucero's opinion is "an alternative holding" or somehow consistent with the Second Circuit approach (notwithstanding a direct conflict between the holdings), then the Tenth Circuit instead conflicts with the Sixth Circuit, which clearly imposes a *per se* ban. *See Suster v. Marshall*, 149 F.3d 523 (6th Cir. 1998); *Kruse v. City of Cincinnati*, 142 F.3d 907 (6th Cir. 1998).

[5] Expert witness Larry Makinson testified that the average cost for winning a seat in the House of Representatives grew from $100,000 in 1974 ($200,000 in 2001 dollars) to $840,000 in 2000. Homans App. 207.

amass the amount that a winning Senate race would cost." *Id.* n.3 (emphasis added) (*citing* Herbert Alexander, *Financing Politics: Money, Elections, and Political Reform* 54 (1992)). The pressures are even greater today, and exist at the local level as well. Homans App. 212; Rue App. 709. The time spent raising money comes at the cost of fulfilling the duties for which officeholders are elected. Bradley/Simpson Br. at 3-12; *see also Amici* Brief of Senator Ernest F. Hollings *et al.* ("Hollings Br."), at 7-10.

The records in these cases present ample evidence supporting the interest in preserving the time of officeholders and candidates. Both fact and expert witnesses attested to the effect of the arms' race mentality, in which each candidate feels compelled to continue fund-raising to ensure that s/he is not outspent by an opponent, on the performance of official duties. *See* Homans App. 512 (Jim Baca); Rue App. 704-705 (Michael Cadigan); Rue App. 708-709 (Dede Feldman); Homans App. 467-482 and Rue App. 585-601 (Martin Schram); Homans App. 212-214 and Rue App. 636-638 (Larry Makinson).

In short, the experience since *Buckley* has proven that the constant need to raise funds to compete in the campaign spending arms' race fundamentally distorts "the core functioning of representative democracy."[6] Hollings Br. at 8.

## IV. THE PROPOSED ALTERNATIVES DO NOT ADDRESS THE TIME-PROTECTION INTEREST AS WELL AS CANDIDATE EXPENDITURE LIMITS.

Respondents' oppositions provide suggested alternatives to spending limits, which the oppositions claim are

[6] The distorting effect is just as great upon elected judges and the judiciary. *See Amici* Brief of Current and Former State Court Justices and Judges, at 3-7.

more narrowly tailored to solving the problem of candidates spending excessive time on fundraising. Because the Rue case was decided on summary judgment, there was no opportunity for factual findings on narrow tailoring. And, in the proceedings below, Respondent Homans did not offer any alternatives. Nevertheless, none of the proposed alternatives fits the time-protection interest better than spending limits.

Narrow tailoring "does not require exhaustion of every conceivable . . . alternative." *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003). Nor does it require the City to choose to address only one of many different compelling interests. *Id.*; *see also City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509-510 (1989) (city had many alternatives that "would have [had] little detrimental effect on the city's [other] interests"); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 n.6 (1986) (alternatives must serve the interest "about as well" and at "tolerable administrative expense") (citations omitted). In addition, for any of the proposed alternatives to render spending limits insufficiently tailored, the proposed alternatives must be workable. *Grutter*, 539 U.S. at 339.

None of the proposed alternatives to spending limits is workable because none addresses the arms' race mentality that creates a never-ending quest for additional funds and threatens to crowd out democratic representation.

*Increasing contribution limits*: Increasing contribution limits is a poor fit for addressing the time-preservation interest because doing so undermines the compelling interest in deterring the reality and appearance of corruption. *See Buckley v. Valeo*, 424 U.S. 1, 23-38 (1976) (noting that large donations foster corruption and its appearance); *cf.* Hollings Br. at 8. The Constitution does not obligate the City to choose between deterring the reality or appearance

of corruption, on the one hand, and preserving the time of officeholders and candidates, on the other.

*Making city councilor a full-time position so that City Council members would not need outside jobs*: As an empirical matter, it is clear that this alternative does not solve the problem; federal officeholders, whose positions are all "full-time," are nevertheless extraordinarily consumed with fundraising. *See* Homans App. 212-214 (testimony of Larry Makinson); *see also* Bradley/Simpson Br. at 3-13; Hollings Br. at 7-8. Without spending caps, eliminating outside jobs held by City Councilors would simply "free" them to spend more time fund-raising so as to avoid being bested in the campaign spending arms' race.

*Increasing the size of the city council or providing more staff to the councilors to reduce the burden on each individual*: These alternatives are so self-evidently insufficient to address the problem that Respondent Rue did not even mention them before the courts below. As with the other proposed alternatives, they are unworkable because they do not address the core problems resulting from unlimited campaign spending.

*Setting Lower Limit for Incumbent than for Challenger*: The Tenth Circuit did not rule against the City for its failure to impose different spending limits on incumbents and challengers, and Respondent Homans did not raise this alternative below. In any event, the remarkable success of challengers in defeating mayoral candidates in Albuquerque demonstrates that spending limits make elections more competitive for challengers even without differential limits.

*Setting No Limit on Self-Funded Candidates*: A system in which most but not all candidates, even those in the same race, are subject to spending limits is unworkable. Our electoral system is comprised of rules that apply to all candidates. To achieve the goals of deterring the

reality and appearance of corruption, and of preserving the time of candidates and officeholders, spending limits must be imposed on all candidates.

Only candidate spending limits, by setting a target amount for candidates and by providing knowledge of how much an opponent will spend, prevent the arms' race mentality that spurs a never-ending quest for funds. That mentality leads directly to the inordinate amount of time that officeholders and candidates spend fund-raising from, and attending to, donors. Respondents' proposed alternatives do not address this distortion of democracy.

## V. IF THE COURT BELIEVES THAT *BUCKLEY* BARS SPENDING LIMITS, THEN OVER 25 YEARS OF EXPERIENCE JUSTIFY DEPARTURE FROM *STARE DECISIS*.

As Petitioners have argued, *Buckley v. Valeo* need not be overruled in order for the Court to reverse the Tenth Circuit decision. Cert. Pet. at 12-26. Nevertheless, if the Court views *Buckley* as an obstacle, Petitioners contend that the time has come to revisit its decision regarding candidate spending limits.

The principle of *stare decisis* is a "principle of policy," rather than an "inexorable command." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 63 (1996). When decisions are "unworkable," the Court "'has never felt constrained to follow precedent.'" *Id.* (*quoting Payne v. Tenn.*, 501 U.S. 808, 827 (1991). Indeed, this Court has deviated from *stare decisis* when it "has felt obliged 'to bring its opinions into agreement with experience and with facts newly ascertained.'" *Vazquez v. Hillery*, 474 U.S. 254, 265-266 (1986) (*quoting Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 412 (1932) (Brandeis, J., dissenting)). The willingness to reconsider earlier decisions is "particularly true in constitutional cases" because, in

such cases, legislative correction is "practically impossible." *Seminole Tribe*, 517 U.S. at 63.

The campaign finance regime of limited contributions and unlimited spending simply has proven unworkable. It is entirely ineffective in dealing with the reality and appearance of corruption and undue influence. And it has allowed the emergence of an arms' race mentality in which no candidate feels safe stepping off the treadmill of fund-raising. As the *Homans* district court stated, "As the cost of elections rise, candidates for office at every level of federal, state and city government are under a great deal of pressure to engage in fundraising activities and to depend on the good will of their donors." App. 49. Turning officeholders into full-time fundraisers impairs the ability to carry out their duties as representatives and impairs the ability of candidates to spend time attending to the needs of ordinary citizens.

For all these reasons, if the Court views *Buckley* as compelling affirmance of the majority opinion, Petitioners respectfully request that the Court revisit that decision.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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